

SERVED: November 15, 1999

NTSB Order No. EA-4801

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of November, 1999

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| _____ |) | |
| JANE F. GARVEY, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-15159 |
| v. |) | |
| |) | |
| JON R. BARRIE, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPINION AND ORDER

The respondent has appealed the decisional order issued by Administrative Law Judge Patrick G. Geraghty on August 27, 1998, granting the Administrator's Motion for Summary Judgment in this matter.¹ In that order, the law judge found that there were no material issues of fact regarding the Administrator's allegations that respondent violated Sections 91.7(a) and 91.9(a) of the Federal Aviation Regulations (FAR), 14 CFR Part 91, by operating civil aircraft N299GL contrary to its operating limitations, and when it was not in an airworthy condition. Respondent also

¹A copy of the law judge's order is attached.

appeals the law judge's imposition of a 60-day suspension of his Airline Transport Pilot (ATP) certificate, without benefit of a hearing. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's order.² For the reasons that follow, respondent's appeal is denied.

On November 20, 1997, respondent, a pilot for Alpine Aviation, served as pilot-in-command of civil aircraft N299GL, on a ferry flight from Billings, Montana, to Provo, Utah. Civil Aircraft N299GL is authorized for single-pilot operations. On the day in question, the aircraft was to be operated pursuant to an FAA-issued Special Flight Permit (SFP), because it had a crack in the left lower forward vertical stabilizer, and because a scheduled inspection had not been completed. The required work had to be performed at Alpine's principal maintenance facility in Utah. The SFP stated that occupancy of the aircraft during the ferry flight was limited to the pilot, "essential flight crew," and personal baggage. Bill Distefano, the president of Alpine Aviation, who also holds an airframe and powerplant (A&P) mechanic certificate, accompanied respondent on the ferry flight.

The law judge found that whether Mr. Distefano's presence on the aircraft was permissible under the operational limitations of the SFP, *i.e.*, whether he was "essential flight crew," was an issue to be resolved by interpretation of the regulations. Turning to Section 1.1 of the FAR, the law judge determined that

²The Administrator had ordered a 90-day suspension. The Administrator has not appealed this sanction modification.

a "Flightcrew member" is "a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time." Since Distefano is neither a current³ pilot, flight engineer, or flight navigator, he could not, under terms of the SFP, be an "essential flight crew" member. The law judge upheld the allegations of FAR violations. We agree with both his approach to this issue, and with his conclusion. There was no issue of material fact before him, and he did not abuse his discretion by granting summary judgment as to the violations.⁴

Respondent also argues that the law judge's use of summary judgment to dispose of the sanction issue in this case was erroneous. First, he asserts, a hearing would have allowed the judge to observe the demeanor of the witnesses and decide, for himself, whether respondent showed a "contempt for the regulatory scheme," such that his conduct warrants an enhanced sanction, as charged by the Administrator. While we do not disagree that a hearing would have provided certain insights to the law judge that were not available as a result of his disposition by summary judgment, it is apparent from the judge's decision that he made a determination on this issue, and it was in respondent's favor.

The Administrator's counsel argued to the law judge that

³Although Mr. Distefano holds an airman certificate, he does not have the necessary rating for this aircraft, nor does he hold a current medical certificate. Therefore, he could not properly be assigned flight duties.

⁴Because the SFP authorized the operation of an otherwise unairworthy aircraft, the failure to comply with its operating limitations voided that authorization.

Board precedent supported a 90-day suspension. Counsel first cited Administrator v. Barber, NTSB Order No. EA-4304 (1994), where the Board imposed a 75-day suspension against a pilot who operated an aircraft under instrument flight rules and with two unauthorized individuals, even though the SFP limited operation to essential flightcrew members on board, and only under visual flight rules. Counsel next cited three Board decisions, Administrator v. Brothers, 6 NTSB 1241 (1989), Administrator v. Gaunce, 4 NTSB 53 (1982), and Administrator v. Ferguson and Bastiani, 3 NTSB 3068 (1980), for the proposition that, where there is evidence of a lack of compliance disposition, a sanction may be enhanced. Counsel argued that, because Mr. Distefano boarded the aircraft with respondent's knowledge, and in full view of the FAA inspectors who had issued the SFP, respondent evidenced a "contempt" that warranted a sanction greater than 75 days. The law judge's reduction of the sanction ordered by the Administrator was an implicit rejection of this argument.

Respondent further argues that summary judgment on sanction was error because there are "questions of fact and law" with respect to whether a 60-day suspension is consistent with the Administrator's Sanction Guidance Table [FAA Order 2150.3A] and Board precedent. Appeal brief at 17. We disagree. The sanction the law judge selected was supported by precedent, see Administrator v. Yarsley, 6 NTSB 524 (1988); it is less than the sanction imposed in Barber, *supra*, which involved another

regulatory violation in addition to that charged here; and it is within the range cited by FAA counsel and suggested by the Sanction Guidance Table (i.e., 30 to 180 days). In these circumstances, we cannot conclude that the law judge's decision to grant summary judgment on the issue of sanction should be disturbed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's order is affirmed; and
3. The 60-day suspension of respondent's ATP certificate shall commence 30 days after the service date indicated on this opinion and order.⁵

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁵For purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).